Filed 3/2/10 Hansen v. Vaughan CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VALENTINA HANSEN,

Plaintiff and Respondent,

v.

KAREL DOUGLAS VAUGHAN, M.D., INC., et al.,

Defendants and Appellants

2d Civil No. B215910
(Super. Ct. No. 56-2008-0320094-CU-OE-VTA)
(Ventura County)

Karel Douglas Vaughan, M.D., Inc., and Karel Douglas Vaughan (KDV and Vaughan, or collectively, appellants) appeal from an order denying their petition to compel arbitration after Valentina Hansen filed a lawsuit raising various claims relating to her employment with them. Appellants contend that the court erred by denying their motion to compel arbitration on the grounds that the agreement was unconscionable and they did not timely exercise their arbitration rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2007, Hansen began working for appellants as a medical assistant. On May 3, 2007, she signed two documents concerning their policies and her employment. Hansen resigned from appellants' employment, effective February 26, 2008.

On June 5, 2008, after obtaining a right to sue letter from the Department of Fair Employment and Housing (DFEH), Hansen filed a complaint against KDV and Vaughan seeking damages and other relief. She alleged that she had been subjected to ongoing verbal, visual, and physical sexual harassment from April 9, 2007, through February 22, 2008. Hansen further claimed that appellants regularly required her to work without meal and rest breaks, and that they failed to pay her final wages within the time required by Labor Code section 201. Her complaint states several causes of action against both appellants, including sexual harassment, in violation of the Fair Employment and Housing Act. It also states a sexual battery cause of action against Vaughan and a wrongful constructive termination in violation of public policy against KDV.

On August 12, 2008, appellants filed a general denial answer which alleged 14 affirmative defenses. The answer did not allege the existence of an arbitration agreement as the means for resolving the dispute between the parties. On February 24, 2009, they filed a petition to compel arbitration and stay Hansen's civil action.

The Arbitration Agreement

The parties refer to a single-page document entitled "Acknowledgement of and Agreement with Karel Douglas Vaughan, M.D., Inc. Arbitration Policy" as the arbitration agreement. Its provisions are set forth below:

"My signature on this document acknowledges that I understand the above Arbitration Policy and agree to abide by its conditions. I also acknowledge that I understand my employment is at-will and may be terminated at any time, with or without reason, by Karel Douglas Vaughan, M.D., Inc., or myself. I further agree that, in accordance with Karel Douglas Vaughan, M.D., Inc.'s Arbitration Policy that I will submit any dispute - including but not limited to my termination - arising under or involving my employment with his practice to binding arbitration within one (1) year from the date the dispute first arose. I agree that arbitration shall be the exclusive forum for resolving all disputes arising out of or involving my employment with Karel Douglas Vaughan, M.D., Inc., or the termination of that employment. I agree that I will be entitled to legal representation, at my own cost, during arbitration. I further understand

that I will be responsible for half of the cost of the arbitrator and any incidental costs of arbitration." Hansen and a KDV supervisor each signed the agreement on May 3, 2007.

In her declaration in opposition to the motion to compel arbitration, Hansen states that she "felt [she] had no choice other than to sign KDV's arbitration agreement without making any changes - either additions or deletions - since it was clearly being required of [her] in order for [her] to continue [her] employment."

On May 3, 2007, Hansen also signed a document entitled, "Receipt and Acknowledgment [of] Karel Douglas Vaughan, M.D., Inc. Employee Manual," which begins with a request or direction stating: "Please read the following statements, sign below and return to your manager." The acknowledgement states: "I have received and read a copy of the aforementioned Employee Manual. I understand that the policies and benefits described in it are subject to change at the sole discretion [of] Karel Douglas Vaughan, M.D., Inc., at any time. [¶] At-Will Employment [¶] I further understand that my employment is at will . . . . I am free to terminate my employment with [KDV] at any time, with or without reason. Likewise, [KDV] has the right to terminate my employment, or otherwise discipline . . . me at any time, with or without reason, at his discretion. . . . Arbitration [¶] I also acknowledge I have read and understand the Arbitration Policy contained in this Employee Manual and I agree to abide by the policy. . . ." (Bold typeface deleted.)

Neither Vaughan nor any KDV manager or supervisor executed the employee manual acknowledgement. Appellants' March 5, 2009, interrogatory responses state that the parties' employment relationship was governed by several documents, including the arbitration agreement and the employee manual acknowledgement.

The Trial Court's Ruling

The court denied appellant's petition to compel arbitration. Its ruling listed the following reasons for finding that the arbitration agreement was unenforceable: "(1) it improperly seeks to impose on the plaintiff one-half of the costs of arbitration; (2) it restricts plaintiff's recovery to those events occurring within a year of the filing of

the claim or action [which] potentially limits plaintiff's recovery for continuing acts which she alleges began at the very inception of her employment; [and] (3) [appellants'] assertion of their right to arbitration was not timely exercised. Taken together, these circumstances operate to the palpable prejudice of the plaintiff."

DISCUSSION

Standard of Review

"On appeal from the denial of a motion to compel arbitration, '"we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law. . . ." . . .' [Citation.] With respect to unconscionability, the trial court's findings 'are reviewed de novo if they are based on declarations that raise "no meaningful factual disputes." . . . However, where an unconscionability determination "is based upon the trial court's resolution of conflicts in the evidence, or on the factual inferences which may be drawn therefrom, we consider the evidence in the light most favorable to the court's determination and review those aspects of the determination for substantial evidence." . . . The ruling on severance is reviewed for abuse of discretion. . . .' [Citation.]" (*Ontiveros v. DHL Exp. (USA), Inc*. (2008) 164 Cal.App.4th 494, 502 (*Ontiveros*).)

Unconscionability

Unconscionability has both procedural and substantive elements, both of which must be present to render a contract unenforceable. (*Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal.4th 83, 114 (*Armendariz*).) "[T]hey need not be present in the same degree. . . . [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Ibid*.)

"Procedural unconscionability focuses on the elements of oppression and surprise. [Citation.] '"'Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. . . . Surprise involves the extent to which the terms of the bargain are hidden in a 'prolix printed form' drafted

by a party in a superior bargaining position.'"'" [Citations.]" (*Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, 1469 (*Roman*).)

"Substantive unconscionability focuses on the actual terms of the agreement and evaluates whether they create '"'overly harsh'"' or '"'one-sided'"' results' [citations] that is, whether contractual provisions reallocate risks in an objectively unreasonable or unexpected manner. [Citation.] Substantive unconscionability 'may take many forms,' but typically is found in the employment context when the arbitration agreement is [so] 'one-sided' in favor of the employer . . . [that it] . . .'". . . '*shock[s] the conscience*. . . .'" (*Roman*, *supra*, 172 Cal.App.4th at p. 1469.)

Our Supreme Court has recognized that adhesion contracts in the employment context typically contain some measure of procedural unconscionability. "The economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement." (*Armendariz*, *supra*, 24 Cal.4th at p. 115.)

Appellants do not dispute the unconscionability of the agreement's cost-sharing provision. Rather, they challenge the court's conclusion that the shortened statute of limitations provision is unconscionable. The court noted that the shortened limitations provision potentially restricts Hansen's recovery for continuing acts that she alleges began at the very inception of her employment.

Citing *Green Tree Financial Corp. Alabama v. Randolph* (2000) 531 U.S. 91, (*Green Tree*), and *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159, 1164 (*Crippen*), appellants contend that the shortened limitations period does not prejudice Hansen's recovery for missed meal and rest break claims for the initial two months of her employment, because there is "no factual support" for those claims. Respondent's complaint includes a claim for missed meal and rest breaks, but no separate declaration regarding those claims. It does, however, incorporate her sworn complaint to the DFEH, which includes the dates of her employment. Moreover, appellants misplace their reliance on *Green Tree* and *Crippen*. Neither case involves a shortened limitations

provision or an employment relationship. In fact, *Crippen* states that "shopping for a motor home is simply not comparable to seeking employment." (*Id.* at p.1166.)

In considering whether the arbitration agreement in this case is unconscionable, we note that appellants reserved a unilateral right to modify the arbitration agreement. (This was not cited by the court or raised by the parties below, or in this court.) The parties' employment relationship is governed by the employee manual acknowledgement and the arbitration agreement, according to appellants. The employee manual acknowledgement refers to the arbitration policy. It states: "I understand that the policies and benefits described in it are subject to change at the sole discretion [of] Karel Douglas Vaughan, M.D., Inc., at any time."

A unilateral modification provision adds to the unconscionability of an arbitration agreement. Unilaterally imposing changed contract terms includes elements of both oppression and surprise, depending on the adequacy of the notice to employees. (See *Ingle v. Circuit City Stores, Inc*. (9th Cir. 2003) 328 F.3d 1165, 1179 [unilateral modification provision in employment arbitration agreement was substantively unconscionable].)

We recognize that courts have upheld challenges to unilateral modification provisions in employment arbitration agreements in some cases. In such cases, the agreements generally include requirements that temper the employer's exercise of the unilateral modification power. For example, in *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214, the agreement provided that the employee handbook could not be changed in any way by oral statement or practice; that only the president of the employer could change the handbook; and that if the employer made any material changes, it would give the employee a copy of those changes. In this case, the agreement lacks comparable requirements to temper appellants' exercise of their unilateral modification power.

Severance

Appellants contend that the trial court erred when it refused to sever the unconscionable provisions and instead determined that the entire agreement is unenforceable. We disagree.

"'[T]he Legislature expressly and directly recognizes judicial discretion to sever objectionable provisions. . . .'" (*Ontiveros, supra*, 164 Cal.App4th at p. 514.) The governing statute, Civil Code section 1670.5, subdivision (a), provides that "'. . . [i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.'" [Citations.]" (*Ontiveros, supra*, at p. 514.) "[T]he statute appears to give a trial court some discretion as to whether to sever or restrict the unconscionable or [illegal] provision or whether to refuse to enforce the entire contract." (*Armendariz, supra*, 24 Cal.4th at p. 122.) We review the trial court's ruling on severance for an abuse of discretion. (*Ontiveros, supra*, at p. 502.)

"*Armendariz* points out that the case law implicitly identifies two reasons for severing illegal terms from an arbitration agreement rather than voiding the entire contract. 'The first is to prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of voiding the entire agreement-particularly when there has been full or partial performance of the contract. . . . Second, more generally, the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. . . .' [Citation.]" (*Ontiveros, supra*, 164 Cal.App.4th at p. 514.)

In determining whether severance is appropriate, one factor that the court can consider is "whether the agreement contains more than one objectionable term. The fact that an 'arbitration agreement contains more than one unlawful provision' may 'indicate a systematic effort to impose arbitration on an employee . . . as an inferior forum that works to the employer's advantage' and may justify concluding 'that the arbitration

agreement is permeated by an unlawful purpose. . . .' [Citation.] . . . Where the taint of illegality cannot be removed by severance or restriction, the court 'must void the entire agreement.' [Citation." (*Ontiveros, supra,* 164 Cal.App.4th at p. 515.)

Here, the court concluded that two provisions of the arbitration agreement are unconscionable--the cost-splitting provision and the shortened limitations period provision. Given these multiple unconscionable provisions, we conclude that the court acted within its discretion in denying the petition to compel arbitration. (See *Armendariz, supra,* 24 Cal.4th at p. 126; compare *Roman, supra,* 172 Cal.App.4th at p. 1478 [agreement did not contain more than one unconscionable provision].) In light of our conclusion, we do not address whether appellants timely exercised their arbitration rights.

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Costs on appeal are awarded to respondent.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Henry Walsh, Judge

Superior Court County of Ventura

Theodora Oringher Miller & Richman, Kenneth E. Johnson, for Defendants and Appellants.

Anticouni & Associates, Jennifer R. Raphael, for Plaintiff and Respondent.